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Teo Sui Chin & Ors v Lim Siok Luan

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02(NCVC)(W)-137–1 OF 2016
ZAWAWI SALLEH, ABDUL RAHMAN SEBLI AND ABDUL KARIM JJCA
16 JULY 2018

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Land Law — Easements — Extinguishment of — Whether extinguished by effluxion of time — Whether deeds contained provision limiting right of way to any length of time — Whether respondent entitled to extinguish registered easement — Whether there was partial release or abandonment of registered easement

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This was an appeal against the decision of the High Court which dismissed the appellants' claim and allowed in part the respondent's counterclaim. The appellants were the current registered proprietors of Lot 255 Section 18 Kuching Town and District ('Lot 255') and the defendant was the current registered proprietor of Lot 254, Section 18 Kuching Town Land District ('Lot 254'). Both Lots 254 and 255 adjoined each other. Lots 254 and 255 were initially part of a parent lot described as Lot 29 Section 18 Kuching Town Land District. The parent lot was applied to be subdivided into six parcels of land which included both Lots 254 and 255. It was a condition for the approval of the survey plan for the subdivision by the Kuching Municipal Counsel that an access road of an uniform width of feet was registered as an easement right of way appurtenant to Lot 255 over Lot 254 because it was a land in a development area by the survey plan. Both appellants and respondent had houses on the respective lands. Their houses faced Green Road, a busy thoroughfare in Kuching but that of the respondent was in front whilst the house on the appellants' land was behind. Being right behind that of Lot 254, Lot 255 was granted an easement or right of way over Lot 254. That right of way was registered before the issuance of the title on 23 March 1966 by a memorandum of endorsement of condition of survey plan approved under the Land (Control of Subdivision) Ordinance. For years, the appellants had enjoyed the use of that access road, concreted no less until June 2014 when the respondent constructed a concrete base fence along their property which rendered the access road was less than 16ft, and thereby deprived them of a right which they had enjoyed for decades. The appellants contended that the respondent had no right to build the fence, to remove the same and sought for damages to be accessed. The High Court dismissed the appellants' claim and granted the respondent a declaration that the respondent was entitled to maintain the fence. The appellants submitted the following grounds of appeal:

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A (a) the parties were bound by the easement since it was legally created and granted without limitation of time; (b) there was no estoppel against right pursuant to statutory provisions; and (c) there was no actual knowledge and no representation by the appellants to take away the legal and proprietary right. In turn, the respondents submitted that there were no merits in the appeal.

B

Held, allowing the appeal with costs of RM15,000; decision of the High Court set aside:

(1) The learned trial judge was wrong to hold that the respondent was C entitled to raise the issue of delay as it was not pleaded in the respondent's defence. It breached the elementary principle of pleading and the parties were bound by their pleadings. It was unjustified in the sense that none of the parties disputed the existence of the registered easement and the respondent did not anywhere in the pleading or evidence claimed that D the easement was totally determined, released, abandoned or withdrawn. The respondent should have pleaded the issue, if the respondent wanted to challenge the easement from that perspective and failing which the learned judge ought not to have raised and considered it (see para 14).

E (2) The court was of the opinion that the registered easement was not lost merely by effluxion of time due to the alleged non-action. As a general rule, an easement depends entirely for its existence on the grant which created it for a certain duration, when that time had elapsed the grant is gone. Since the grant of the easement did not contain any provision as to time limitation, the determination or extinguishment by effluxion of F time did not arise or applied. There was no justification to interpolate by putting into the concept of effluxion of time, either as to its duration or due to the inaction of the appellants, to defeat the very purpose it was given (see paras 15 & 17).

G (3) In the absence of any written contract or deed to the contrary, there was no provision in the Sarawak Land Code providing for the release or abandonment of only part of the land. There was no intention proved that the appellants no longer required the easement or that it had not been used for such a long time. The easement must mean the entire H easement and not merely partial easement. In any event, mere non-user of the part of the easement due to having no exact knowledge of the terms of the easement did not amount to partial abandonment or release of the easement (see paras 18–19).

I **[Bahasa Malaysia summary**

Ini adalah merupakan rayuan terhadap keputusan Mahkamah Tinggi yang telah menolak permohonan perayu-perayu dan telah membenarkan sebahagian daripada tuntutan balas responden-responden. Perayu-perayu merupakan pemilik yang berdaftar untuk Lot 255 Seksyen 18 Bandar dan

Daerah Kuching ('Lot 255') dan defendan merupakan pemilik untuk Lot 254 Seksyen 18, Bandar dan Daerah Kuching ('Lot 254'). Kedua-dua Lot 254 dan 255 adalah bersebelahan. Lot 245 dan 255 adalah merupakan sebahagian daripada lot asal yang dikenali sebagai Lot 29 Seksyen 18 Bandar dan Daerah Kuching. Lot asal telah dimohon untuk dipecahkan kepada enam bahagian tanah yang mengandungi Lot 254 and Lot 255. Syarat yang telah dikenakan oleh Kuching Town Land District untuk kebenaran pelan ukuran untuk pembahagian adalah kemudahan jalan akses yang mempunyai lebar yang seragam didaftarkan sebagai easemen dan hak untuk laluan bersampingan kepada Lot 255 dan bukan kepada Lot 254 kerana Lot 254 merupakan kawasan tanah pembangunan seperti dinyatakan dalam pelan ukuran. Kedua-dua perayu dan responden mempunyai rumah di atas tanah masing-masing. Rumah-rumah mereka berhadapan dengan Green Road, yang merupakan jalan yang sibuk di Kuching namun rumah responden-responden adalah di hadapan jalan tersebut manakala rumah perayu-perayu adalah di kedudukan di belakang. Disebabkan posisi Lot 254 di belakang, Lot 255 diberikan isimen atau hak terhadap laluan terhadap Lot 254. Hak terhadap laluan tersebut telah didaftarkan sebelum geran dikeluarkan pada 23 Mac 1966 oleh memorandum pengendorsan untuk syarat pelan ukuran diluluskan di bawah Land (Control of Subdivision) Ordinance. Perayu-perayu telah menggunakan laluan akses yang dikonkritkan selama bertahun-tahun namun pada Jun 2014 responden telah membuat tembok berasaskan konkrit sepanjang bangunan mereka yang telah menyebabkan laluan akses telah menjadi kurang daripada 16 kaki dan menyebabkan mereka dihalang daripada hak yang telah dinikmati selama berdekad-dekad. Perayu telah berhujah bahawa responden tidak mempunyai hak untuk membina tembok tersebut, untuk memindahkan tembok tersebut dan gantirugi yang perlu ditaksirkan. Mahakamah Tinggi telah menolak permohonan perayu-perayu dan membenarkan deklarasi responden bahawa responden berhak mengekalkan tembok tersebut. Perayu-perayu telah berhujah atas alasan-alasan berikut: (a) pihak-pihak adalah tertakluk kepada isimen yang telah dicipta dan diberikan tanpa kekangan masa; (b) tidak mempunyai estoppel terhadap hak di bawah peruntukan statutori; dan (c) tiada pengetahuan sebenar dan tiada representasi daripada perayu-perayu untuk merampas hak undang-undang dan pemilikan. Sebaliknya, responden-responden telah berhujah bahawa tiada merit di dalam rayuan tersebut.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM15,000 dan menolak keputusan Mahkamah Tinggi:

(1) Hakim mahkamah terkhilaf kerana menyatakan responden berhak untuk mengemukakan isu kelewatan kerana ianya tidak diplidkan di dalam pembelaan oleh responden. Ia telah melanggar prinsipal penting dalam isu pliding dan pihak-pihak adalah tertakluk kepada pliding mereka. Adalah tidak wajar berikutan perkara tersebut kerana kedua-dua

pihak tidak mempertikaikan kewujudan isimen yang telah didaftarkan dan responden tidak, di dalam mana-mana pliding atau bukti, menyatakan bahawa isimen adalah sama sekali ditentukan, dilepaskan, dibiarkan atau ditarikbalik. Responden sepatutnya memplidkan isu tersebut sekiranya mahu untuk mencabar isimen tersebut daripada perspektif tersebut dan hakim mahkamah sepatutnya, susulan daripada kegagalan untuk membuat perkara tersebut, tidak boleh mengemukakan dan mempertimbangkan perkara tersebut (lihat perenggan 14).

(2) Mahkamah berpendapatan bahawa isimen berdaftar adalah tidak hilang hanyalah kerana *effluxion* masa kerana tuduhan tiada tindakan dibuat. Secara amnya, isimen bergantung sepenuhnya kepada kewujudannya di atas pemberian yang telah diwujudkan untuk tempoh yang ditetapkan, dan apabila ia telah luput, pemberian akan tidak berkuat kuasa. Disebabkan pemberian isimen tidak mempunyai sebarang tempoh yang ditetapkan, maka penentuan atau peluputan masa oleh *effluxion* tidak patut berbangkit atau digunakan. Tiada justifikasi untuk menyelitkan dengan memasukkan konsep *effluxion* masa, samada untuk durasi masa atau tiada tindakan oleh perayu-perayu, untuk menghentikan tujuan asal ianya diberikan (lihat perenggan 15 & 17).

(3) Sekiranya tiada perjanjian bertulis atau surat ikatan yang menunjukkan sebaliknya, tiada peruntukan di bawah Kanun Tanah Sarawak menyatakan perlepasan atau pengabaian hanya sebahagian daripada tanah. Tidak dapat dibuktikan bahawa perayu-perayu tidak lagi memerlukan isimen tersebut atau ia tidak digunakan oleh sekian lama. Isimen tersebut haruslah bermaksud keseluruhan isimen dan tidaklah sebahagian daripada isimen tersebut. Hanya disebabkan tidak mengunakan sebahagian daripada isimen tersebut kerana tidak mempunyai pengetahuan yang tepat terhadap syarat isimen tidak dikira sebagai pengabaian sebahagian dan perlepasan isimen tersebut (lihat perenggan 18–19).]

Cases referred to

Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal [2004] 1 MLJ 353; [2004] 1 CLJ 357, CA (refd)

Chin & Sons Sdn Bhd & Ors v William Crocket & Ors [2000] 5 MLJ 497, HC (refd)

Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd [1991] 1 MLJ 404, SC (refd)

Jones v Tapling (1862) 12 CBNS 826 (refd)

Karisma Thakurdas Jethwani v Malayan Banking Berhad [2015] MLJU 792, HC (refd)

Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] 1 MLJ 49, PC (refd)

Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428, SC (refd)

Lord Dynevor v Tennant (1886) 32 ChD 375, Ch D (refd)

Ng Yee Fong & Anor v EW Talalla [1986] 1 MLJ 25, SC (refd)
Puran Singh v Kehar Singh; Bahadur Singh [1939] 1 MLJ 71 (refd)
Salvage Engineers Limited, Re [1962] 1 MLJ 438 (refd)
The Chartered Bank v Yong Chan [1974] 1 MLJ 157, FC (refd)
United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352b, HC (refd)

Legislation referred to

Land (Control of Subdivision) Ordinance (Cap 82) s 10
National Land Code 1956 ss 282, 283, 284, 285, 286, 287, 288, 289, 290 , 291, 291(c)
Sarawak Land Code (Cap 81) ss 132, 141

Appeal from: Suit No KCH-22NCVC-59/9 of 2014 (HC 2) (High Court, Kuching)

(Chong Brothers Advocates) for the appellants.
(Ee & Lim Advocates) for the respondent.

Abdul Karim JCA:

[1] This is an appeal by the appellants (plaintiffs in the High Court) against the decision of the learned High Court judge, Kuching, Sarawak, who had, at the end of the trial, dismissed the appellants' claim, but allowed in part the respondent's (the defendant in the high court) counterclaim. For the purpose of this judgment, the parties will be addressed as they were in the trial court.

[2] After hearing submissions from counsels representing both parties and on a consideration of all the materials on record, we had unanimously found that there were merits in the plaintiffs' contentions and therefore allowed their appeal. In the same breath, we dismissed the defendant's counterclaim in so as it was allowed by the learned trial judge. The reasons in deciding as we did will now be given.

THE PLAINTIFFS' CLAIM

[3] In their claim in the High Court, the plaintiffs sought for the following remedies:

(a) a declaration that the defendant is not entitled to build or cause to be built any building or other erections upon an access road of a uniform width of 16ft on Lot 254 Section 18 Kuching Town Land District, a registered easement right of way appurtenant to Lot 255 over Lot 254 Section 18 Kuching Town Land District vide memorandum of endorsement of conditions of survey plan approved under the Land

(Control of Subdivision) Ordinance No L 2396/66 of 23 June 1966;

(b) that the defendant do remove the concrete base fence constructed on the registered easement right of way appurtenant to Lot 255 over Lot 254 Section 18 Kuching Town Land District;

(c) damages to be assessed;

(d) costs; and

(e) such other further and other relief as the court deems just.

BACKGROUND FACTS

[4] In order to appreciate the issues and argument raised by parties, it is apposite to narrate briefly the facts of the case upon which the above claim was founded. Most of the basic facts as agreed in the pleadings and found by the learned trial judge are not in dispute. Stripped to the essentials, the facts as found or admitted are as follows:

(a) the plaintiffs are the current registered proprietors of Lot 255 Section 18 Kuching Town Land District ('Lot 255') and the defendant is the current registered proprietor of Lot 254, Section 18 Kuching Town Land District ('Lot 254'). Both Lots 254 and 255 adjoin each other;

(b) Lots 254 and 255 were initially part of a parent lot described as Lot 29 Section 18 Kuching Town Land District. The parent lot was applied to be subdivided into six parcels of land which included Lots 254 and 255. It was a condition for the approval of the survey plan for the subdivision by the Kuching Municipal Council 'that an access road of an uniform width of 16ft be registered as an easement right of way appurtenant to Lot 255 over Lot 254 Section 18 Kuching Town Land District' because it was a land in a development area by the survey plan;

(c) under s 10 of the Land (Control of Subdivision) Ordinance the Director General of Lands and Surveys was directed to make or cause to be made in the land register the endorsement of the conditions of the approved survey plan against the land registers relating to the parcel of land subdivided. The memorandum of endorsement of conditions of survey plan approved under the Land (Control of Subdivision) Ordinance No L 2396/66 of 23 June 1966 was made and registered, and the easement was registered and endorsed on the respective documents of titles of both Lots 254 and 255 on 24 Octobe r1966. The endorsement specifically provides as follows:

> Easement:
>
> That an access road of an uniform width of 16 feet be registered as an easement right of way appurtenant to Lot 255 over Lot 254 Section 18

Kuching Town Land District. Vide Memorandum of endorsement of Conditions of Survey Plan approved under the Land (Control of Subdivision) Ordinance No L 2396/66 of 23.6.1966.

(d) both parties have houses on the respective lands. The plaintiffs' house No 155A, and the defendant house No 155 face a busy thoroughfare in Kuching, ie Green Road but that of the defendant is in front whilst the house on the plaintiffs' land is behind;

(e) the titles to both land were issued on the same date ie 24 October 1966. The defendant's husband acquired Lot 254 in 1991 and upon his death in 2012, the land was transferred to her. Being right behind that of Lot 254, Lot 255 was given an *easement* or *right of way* over Lot 254. That right of way was registered, before the issuance of the title on 23 March 1966, by a memorandum of endorsement of condition of survey plan approved under the Land (Control of Subdivision) Ordinance No L 2396/66 as stated above;

(f) for years, the plaintiffs have enjoyed the use of that access road, concreted no less until June 2014 when the defendant constructed a concrete base fence along their property which rendered the access road to be *less than 16ft*, thereby depriving them of a right which they have enjoyed for decades; and

(g) the plaintiffs have therefore filed this action to declare that the defendant has no right to build such a fence, to remove the same and for damages to be assessed.

[5] The defendant resisted the plaintiffs' claim. In her defence, the defendant, inter alia, averred as follows:

(a) the said access road or driveway has always been of the same width at the time when their property was fenced up with a chain-link fence until the present fence with its concrete base and iron rods was built;

(b) the residents of Lot 255 have been able to use the access road with no hindrance during and after the construction, did not complain when the construction of the concrete fence was in progress and which fence was constructed on their own land;

(c) the defendant thus pleaded *estoppel* and alternatively *waiver* of their rights as the plaintiffs or the predecessors were aware of the construction of the access road by the developer when their two houses were constructed; and

(d) in fact, the plaintiffs could have an alternative access through another feeder road at the back of their house known as Cookes Drive and have therefore counter-claimed for, inter alia, a declaration that she be entitled to apply to the relevant authority to cancel the said easement or alternatively a rectification to reflect the actual width of the access road.

THE HIGH COURT DECISION

[6] Briefly, after full trial, the learned trial judge found, inter alia, as follows:

(a) the plaintiffs are estopped by their own conduct to litigate their right to a 16ft access road after living with it for almost half a century — the conduct being waiver and delay to do so, in other words, their right to that 16ft driveway has lapsed by effluxion of time (see judgment at AR Vol 1 p 14 lines 13–15);

(b) although the plaintiffs only came to be registered co-proprietors of Lot 255 at different dates after various transfers were effected from their original co-proprietors, knowledge of the size of the access road cannot have escaped all of the plaintiffs because the first plaintiff's parents lived at Lot 255 (see judgment at AR Vol 1 p 16 lines 9–15);

(c) notwithstanding the plaintiffs' evidence that they were unaware of the rightful 16ft width of the access road until the construction of the new fencing by the defendant, the easement and its width of 16ft is boldly printed on the land title when the transfers of shares in Lot 255 were transferred to the second to fourth plaintiffs in 2006 and to the first plaintiff in 2012, because Lot 255 was earlier owned by the first plaintiff's parents (see judgment at AR Vol 1 p 16 line 20–p 17 line 9);

(d) that there is no issue of the plaintiffs waiving their right to that access road — only whether they could after the lapse of all these years insist that it be 16ft instead of what they have lived with or rather used to all these years (see judgment at AR Vol 1 p 17 lines 16–18); and

(e) the plaintiffs did nothing in a reasonable time after the second to fourth plaintiffs' acquisition of their shares in Lot 255 in 2006, although they claimed that they had no problem with it before the defendant's new fencing (see judgment at AR Vol 1 p 17 line 23).

[7] The learned trial judge, therefore, dismissed the plaintiffs' claim and granted the defendant's prayer 21(ii), a declaration that the defendant is entitled to maintain the new No 155 (ie Lot 254) fence.

GROUNDS OF APPEAL

[8] In their memorandum of appeal, the plaintiffs raised, inter alia, the following grounds in impugning the learned judge's decision:

(a) the learned High Court judge should have found that the plaintiffs are entitled to claim their registered easement right of way of an access road of an uniform width of 16ft over the servient tenement Lot 254 vide memorandum of endorsement of conditions of survey plan approved

under the Land (Control of Subdivision) Ordinance (Cap 82) Instrument No L 2396/1966;

(b) the learned trial judge ought to have held that it is the respondent's duty to observe and comply with the title condition stipulated in the issue document of title in her servient tenement (Lot 254 Section 18 Kuching Town Land District) before she destroyed the old wire chain fence and commenced the construction of the new concrete fence and the pillar on her servient land;

(c) the learned trial judge erred in law and in fact in holding that the plaintiffs had, all the times, actual knowledge of their rights of way of an access road over the servient tenement is 16ft wide and they had slept on their rights to claim the full right, when there is in fact no actual knowledge of such legal right at all material times;

(d) the learned trial judge erred in law and in fact when she held that the appellants/plaintiffs were estopped from claiming their registered easement right of way of an access road of an uniform width of 16ft over the respondent's servient tenement Lot 254 Section 18 Kuching Town Land District by reasons of waiver or delay and/or by effluxion of time, without considering that the easement right of way is a registered easement right of way and that there was clear evidence of PW3 that the appellants had no actual knowledge of the easement right of way of an uniform width of 16ft over the servient tenement in Lot 254, until the time of the construction of the concrete base fence in 2015;

(e) the learned trial judge erred in law and in fact to conclude that there was a waiver and estoppels and/or delay on the part of the appellants when there was, in fact, no evidence of positive act of waiver and actual knowledge of the legal rights of the 16ft wide access road of the dominant owners before the construction of the concrete base fence;

(f) the learned trial judge erred in law and in fact in her conclusion that there was no objection from the appellants against the construction of the concrete base pillar and fence when the construction works of the concrete base fencing was in progress; and

(g) the learned trial judge should have held that by reason of rejecting the appellants' claim of their legal right of the registered easement right of way of an access road of the width of 16ft, the value of the appellants' dominant land has been substantially diminished in value which cannot be adequately compensated by money.

A THE PLAINTIFFS' CONTENTIONS

[9] In their written submission, and flowing from their grounds of appeal as alluded to above, learned counsel for the plaintiffs focused on the following issues:

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(a) parties are bound by the easement since it has been legally created, and granted without limitation of time;

(b) there is no estoppel against right pursuant to statutory provisions; and

C (c) no actual knowledge and no representation by the plaintiffs to take away the legal and proprietary right.

[10] As to issue (a), it was contended that the statutory nature of the registered easement with its attendance terms are not disputed by parties and D endorsed by the court. The court, however, in the course of the trial, made clear findings of facts that the driveway in question measures only 10ft 7.5 inches from the edge of the concrete pillar perpendicularly across to the opposite fence, and 10ft 8 inches from the wall to wall along the driveway (AR Vol 2(1) p 24 para 25 of WSDW2's statement). It was argued that under the general law E on easement, the owner of the servient tenement must not deal with his tenement so as to render the easement over it incapable of being enjoyed or more difficult of enjoyment by the dominant owner. The dominant owner is entitled to the full enjoyment and protection of such right vis the plaintiffs are entitled to an access road of 16ft in law. The servient tenement cannot do F anything which would materially interfere with or render more expensive or difficult the exercise of the right. Hence, it was submitted that it was no defence to a dominant owner's claim to show that the dominant owner may still exercise his right if he only expends more money or exercises greater skill, as held by the learned trial judge that the plaintiffs could have covered up the useless drain at G the side of the driveway.

[11] As to issue (b), it was contended that the equitable principle of estoppel could not apply in this case to the statutory right of the plaintiffs. It was stressed that it is trite that there can be no estoppel as against statutory provisions, here H being a statutory easement created under s 10 of the Land (Control of Subdivision) Ordinance, a matter of general public interest, which the defendant cannot ignore. Learned counsel referred to cases of, inter alia, *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 404, *Re Salvage Engineers Limited* [1962] 1 MLJ 438, *Kok Hoong v Leong Cheong* I *Kweng Mines Ltd* [1964] 1 MLJ 49, *United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352b, *Puran Singh v Kehar Singh; Bahadur Singh* [1939] 1 MLJ 71, and *Karisma Thakurdas Jethwani v Malayan Banking Berhad* [2015] MLJU 792 to support the plaintiffs' argument that it is not open to the court to allow the defendant who

is bound by the legal easement created by statute, which is capable of subsisting at law, to avoid, more so in the absent of any averment of fraud or unconscionable conduct, the legal easement by the operation of an estoppel. In addition, learned counsel submitted that pursuant to s 132 of the Sarawak Land Code the said registered easement gives the plaintiffs indefeasibility in respect of the easement so that registration confers protection on the proprietary interest of the plaintiffs as the co-proprietors of the dominant land. Furthermore, it was submitted that a decision of estoppel in this case has not only affected the plaintiffs but to all subsequent proprietors of Lot 255, and benefited not only the defendant but all subsequent proprietor of Lot 254, and is thus unjust in the circumstances.

[12] As to issue (c), it was contended that the learned judge has misdirected herself and erred in law in finding that the plaintiffs had knowledge of the concerned affairs and are estopped by their own conduct to litigate their right to a 16ft access road after living with it for almost half a century. Learned counsel argued, inter alia, that the evidence shows that none of the parties were aware of the legal easement when they acquired the respective properties. There was also an absence of evidence that it was the plaintiffs (who became co-proprietors of Lot 255 in year 2006) who had induced the defendant (or her late husband) to purchase Lot 254 from her predecessor-in-title in year 1991, which title came with the diminution of right for the registered easement, or that the plaintiffs to be responsible for or in any way connected with inducing or making representation to the predecessor in title of the defendant to construct the driveway and the chain link fence in 1966 or thereabout. The plaintiffs became aware when they sensed difficulty in using the driveway while the concrete fencing was being constructed and made complaints immediately in June 2014. They brought this action when their complaint was not heeded. In the circumstances, it was submitted that there was no acquiescence nor laches nor allowance or encouragement to the defendant in her expenditure of money in the construction of the new concrete fencing by abstaining from asserting the plaintiffs' right. The defendant, as it was submitted, failed to prove otherwise and by the authority of *Ng Yee Fong & Anor v EW Talalla* [1986] 1 MLJ 25 the plaintiffs cannot be held to be guilty of laches so as to disentitle them from the remedy they have sought.

THE DEFENDANT'S CONTENTIONS

[13] Learned counsel for the defendant fully supported the decision of the learned judge and submitted that there was no merit in the plaintiffs' appeal. In response to the plaintiffs' grounds of appeal, learned counsel, in his summary of argument, contended that:

Ground 1

A perusal of the Appellants' Statement of Claim would show that essentially, they

A are seeking an injunction to stop the Defendant from building their fence on the registered easement and also a mandatory injunction for the Defendant to remove or take down the concrete base fence alongside the access road which serves as the easement to their property. The Respondent had referred the High Court to:

B — The Supreme Court decision of *Tinta Press Sdn Bhd v Bank Islam (M) Bhd* CLJ (Rep) 396 which held that discretion must be exercised to grant an injunction 'only in exceptional and extremely rare cases'. And cited the case of *Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yick* [1975] 2 MLJ 109 which was confirmed by the Federal Court in *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150; and

C — Section 54 of the Specific Relief Act 1950 which provides that *"An injunction cannot be granted...*

... (g) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;

D ... (j) when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the court.

A perusal of the judgment *(pages 9 to 21 of the Appeal Record Vol 1 Part A)* would show that the High Court Judge had taken into consideration the fact that at all E times, the Plaintiffs had *ACCESS* to lot 255 through the existing access road which serves as the easement since 1966. She had also taken into consideration:

— for years the Plaintiffs have enjoyed use of that access road and they only raised issue in 2014;

F — they were driving in and out of the access road while the construction of the concrete fence was in progress and they did not complain until June 2014 after the new fence was completed.

— the existing access road although less than 16 feet width was constructed either by the developer or the predecessors of the Plaintiff and G all had accepted and used the access road as the easement to Lot 255.

— the Plaintiffs 'galvanizing into action by litigating their right to a 16 feet access road after living with it for almost half a century is obviously not a solution for the plaintiffs are estopped by their own conduct — the conduct being waiver and delay to do so'.

H — she applied the 'principle in law that the court will not assist an indolent plaintiff who I may add was content to sleep on his rights and in this case by not just a few years but for almost half a century'.

It is the Respondent's submission that the trial judge had clearly taken into I consideration the provision under Section 54(j) of the Specific Relief Act 1950 and she rightly dismissed the Appellant's claim.

Furthermore, PW1 the *Land Registrar* had also confirmed in evidence that 'it is possible for an instrument to wrongly reflect an actual situation'. She agreed 'it is possible that the developer can give the wrong measurement for the easement and it

got registered because the width differs from what is actually developed'. (p 42 appeal record)

Ground 2

The evidence adduced show that when the Defendant's husband acquired Lot 254 in 1991, the access road (as it was and still is) was already in existence and Lot 254 also had a chain-link fence which ran alongside the access road. The access road was outside the chain-link fence and all parties apparently accepted the situation without question. After the chain-link fence was cut by burglars in 2013, the Respondent decided to build the concrete base fence along the same boundary line as the old chain-link fence without encroaching on the existing access road. The evidence show that the Respondent did not even know about the 16 feet easement until the Plaintiffs' demanded they remove the concrete base fence in June 2014 and her son, PW2 went to the land office to enquire. How then can the Respondent be said to be under a duty to observe what she was not aware of?

As rightly found by the trial judge, if the Plaintiffs knew of the 16 feet width access road, why did they wait until after the Respondent had completed construction of the concrete base fence alongside the existing access road to complain. If the Plaintiffs knew at that time, the duty is actually on them to do something then.

The trial judge rightly referred to Lord Dening MR in *WJ Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 All ER 127 that 'the one who waives his strict rights cannot afterwards insist on them' which was quoted by the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331. And also the case of *AMALGAMATED INVESTMENT & PROPERTY CO. LTD (in Liquidation) v TEXAS COMMERCE INTERNATION BANK LTD* (1982) 1 QB 84.

Ground 3

To answer the Appellants contention under Ground 3, I refer to the trial Judge's judgment at page 14 of the Appeal Record. I quote:

> With respect, galvanizing into action by litigating their right to a 16 feet access road after living with it for almost half a century is obviously not a solution for the plaintiffs are estopped by their own conduct — the conduct being waiver and delay to do so. I other words, their rights to that 16 feet driveway has lapsed by effluxion of time. In drawing this conclusion I am aware that the defendant have only pleaded estoppel and waiver as a defence but it does not stop me from construing adversely against the plaintiffs their indolent attitude toward the right given to them by that 1966 memorandum of a 16 feet right of way for I do not need a pleaded fact to move me to apply the often quoted *principle in law that the court will not assist an indolent plaintiff who I may add was content to sleep on his rights and in this case by not just a few years but almost half a century.*

She continued (at page 16 Appeal Record) to show the facts relied on by her to come to the conclusion that the Plaintiffs knew or ought to have known about the width of the easement, bearing in mind their parents had lived there long before the shares in the property was transferred to them. Her finding after due consideration was that 'Nevertheless, knowledge of the size of access road cannot have escaped all of

them because the 1st plaintiff's parents lived there'.

She also referred to the Plaintiffs' own evidence from the land title to Lot 255 (Exhibit P2) when shares in the title was transferred to the 2nd to 4th Plaintiffs on 18.5.2006. She noted the width of the access road *was boldly printed on the land title* and she could not condone the Plaintiff's self-professed ignorance of the width of the easement in the face of such stark evidence.

Ground 4

This ground is similar to Grounds 1 and 3. Suffice that the trial Judge had rightly dealt with these allegations as submitted earlier.

Ground 5

Again this ground is similar to Ground 4. There was clear evidence that the Plaintiffs' parents had been living at Lot 255 for many years and the Plaintiffs had been using the access road and at the time of the trial, were still using the access road. In any case, the trial judge also specifically highlighted the fact that in 2006 when transfer of shares in the lad was made to the 2nd to 4th Plaintiffs the easement and its width of 16 feet was *boldly printed on the land title*, Exhibit P2 produced by the Plaintiffs.

Ground 6

The evidence before the court was clear that the *first complaint made by the Plaintiffs was only in June 2014,* which was after completion of the concrete base fence and the pillar alongside the access road

I repeat Paragraphs 7 and 8 of the Defendants' Reply Submission before the trial Judge *(pages 196-201 Appeal Record Volume 2(2) Part C)* which specifically documented the fact that works started in December 2013 and the fence alongside the access road was completed in January, 2014 just before the Chinese New year and the pillar and front portion (which does not affect the access road) of the fence completed by the Gawai Holidays in June 2014. The photographs produced with dates shown in the printed copies *Exhibit D2* and also in the digital copies produced in the pendrive produced under *item 16 of Exhibit D1* show that even the front portion of the fence was already completed by the time the *photograph 3 in Exhibit D* was taken on the 23 June 2013.

As the trial judge said in her judgment (page 13 Appeal Record) said:

> A picture paints a thousand words.

It is the Respondent's submission there is also no merit to this Ground.

OUR DECISIONS

[14] Before we proceed further, we would comment on one issue which we found the learned judge had seriously erred in law. It is our view that the learned judge was wrong when she held that despite not pleaded in the defendant's defence, she was entitled, as a matter of law, to raise the issue of delay by the plaintiffs to pursue their right to the registered easement (due to

their indolent attitude) and determined the case as she did accordingly relying on it. To us, this approach not only breached the elementary principle of pleading vis parties are bound by their pleading (see, inter alia: *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157, and *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal* [2004] 1 MLJ 353; [2004] 1 CLJ 357) but also unjustified in the circumstances of the case. It is unjustified in the sense that none of the parties dispute the existence of the registered easement, and the defendant did not anywhere in his pleading or evidence claim that the easement was totally determined, released, abandoned or withdrawn. This is clearly reflected in their counterclaim for a declaration that they be entitled to cancel the easement or to have it ratified accordingly, which the learned judge had rightly declined to accede. To us, the defendant should have pleaded the issue, if he wants to challenge the easement from that perspective and failing which the learned judge ought not to raise and consider it in the way she did, *suo motu.*

[15] In any event, it is our view that the learned judge was also wrong in holding that the plaintiffs' right to the statutory easement was lost due to the effluxion of time (vis due to their indolent attitude to pursue that right which was given since 1966). Flowing therefrom, the nice issues to ask are:

(a) whether a right to the statutory registered easement could be lost by effluxion of time when the registered easement itself contained no time stipulation for its existence? and

(b) can there be a partial release or abandonment of a registered easement?

To us, these are serious questions having critical implications to the resolution of the present appeal. We will consider both issues together. In the legal setting it was given, we are of the opinion that the said registered easement is not lost merely by effluxion of time due to the alleged non-action. It is important to note that it is not disputed that the easement is a statutorily registered easement (not pursuant to any contract or a deed between parties) made and endorsed therein pursuant to s 10 of the Land (Control of Subdivision) Ordinance (Cap 82). To recap, it provides that:

> Easement:
>
> That an access road of an uniform width of 16 feet be registered as an easement right of way appurtenant to Lot 255 over Lot 254 Section 18 Kuching Town Land District. Vide Memorandum of endorsement of Conditions of Survey Plan approved under the Land (Control of Subdivision) Ordinance No L 2396/66 of 23.6.1966

[16] What is stark clear is that it does not contain any time limitation or

provision for its duration or validity. Nevertheless, s 141 of the Sarawak Land Code (Cap 81) says:

> Removal of easement
>
> Where an easement has been *determined or extinguished*, the Registrar shall, upon proof to his satisfaction of the determination or the extinguishment, make an appropriate entry upon the Register and upon any relevant instrument relating thereto.
>
> Provided that, unless the determination or extinguishment was by *effluxion of time* or merger, the Registrar before making the entry in the Register shall give notice of his intention so to do to all persons appearing to him to be entitled to any interest under the easement or shall give at least one month's notice of his intention in the *Gazette*.

[17] We note that as a general rue an easement depends entirely for its existence on the grant which creates it, and if the grant which creates it creates it for a certain duration, when that time has elapsed the grant is gone (see: *Lord Dynevor v Tennant* (1886) 32 ChD 375). Since the grant of the easement (under s 10 of the Land (Control of Subdivision) Ordinance (Cap 82)) does not contain any provision as to time limitation, it determination or extinguishment by effluxion of time does not arise or apply — see Judith Sihombing, *The National Land Code A Commentary*; para [954], Chapter XXIII, ss 282–291; *Chin & Sons Sdn Bhd & Ors v William Crocket & Ors* [2000] 5 MLJ 497. In the circumstances, we find no justification to interpolate by putting into the above endorsement the concept of effluxion of time, either as to its duration or due to the inaction of the plaintiffs, to defeat the very purpose it was given. In such a case, we see merit in learned counsel's argument on this point.

[18] On issues raised as alluded to above, and after anxiously considering argument by both parties and the evidence on record, we are inclined to totally agree with learned counsel for the plaintiffs' submissions. We will adopt it as part of this judgment. In addition, we note that though s 141 of the Sarawak Land Code (Cap 81) talks about determination or extinguishment of easement, it does not however provide any definition as to the scope and circumstances of such terms. Apart from common law principles, (as enumerated in *Halsbury's Law of Malaysia* (2003 Reissue) Vol 8, para 150.429 et seq), reference, however, could be made to commentaries made by Judith Sihombing, *The National Land Code A Commentary,* on the provisions of Chapter 2 — Release, extinguishment and cancellation of easement in s 289 et seq. We do not intend to go into detail of such commentaries except on certain precepts which we opine are applicable in the present case. Foremost, we are not here concerned with determination or extinguishment by merger (unity of title) or surrender of such easement. It must be emphasised that both parties, including the learned judge, in the present appeal clearly and categorically

agreed that the concerned registered easement is still subsisting and enforceable. Nevertheless, the learned judge found, in the circumstances as highlighted also by both parties, that the plaintiffs are estopped, due to waiver or effluxion of time, from proceeding to claim the full terms of the easement due to their indolent attitude to pursue such rights. They can only or must only be contented with the driveway, which the court has clearly found to be very much reduced from what had been statutorily granted, as it was earlier constructed and used by them or their predecessors. We are of the view that the learned judge has erred in law in holding as such. Apart from what we have said about the determination of easement by effluxion of time, and in the absence of any written contract or deed to the contrary, there is no provision in the Sarawak Land Code providing for the release or abandonment of only part of the land (see *Jones v Tapling* (1862) 12 CBNS 826). In effect that is exactly the view of the learned trial judge that there was such a partial release or abandonment of the easement by acquiescing to the non-user of the full right as granted statutorily. On abandonment of easement, Judith Sihombing, commenting on para (c) of s 291 of the NLC 1956 says:

> Paragraph (c)
>
> [955]–[1000]
>
> Where the servient land proprietor can prove that the dominant land proprietor no longer uses the easement and will not use it in the future, then the former can apply for cancellation of the registration of the easement on the ground of abandonment: *Re Henderson's Conveyance* (1940) Ch 835; *Re Robinson* (1972) VR 278. To succeed in the application, the servient land proprietor will need to show an expressed intention, preferably documented, that the dominant land proprietor no longer requires the easement or that he no longer intends to use that easement; alternatively, he can show that the easement has not been used for such a long period thereby establishing abandonment: *Tapling v Jones* (1865) 11 HLC 290; *Scott v Pape* (1886) 31 Ch D 554.

[19] What is stark clear in the present case is that no such intention was ever proved that the plaintiffs no longer require the easement or that it has not been used for such a long time. We are of the view the easement here must mean the entire easement and not merely partial easement. In any event, even if we are wrong here, we are of the view that mere non user of a part of the easement due to having no exact knowledge of the terms of the easement, as we found it to be so here, does not amount to partial abandonment or release of the easement. Furthermore, in *Halsbury's Law of Malaysia*, it is commented that:

> [150.437] Effect or mere non-user
>
> In no case, whether the easement is negative or positive, will mere non-user of a right alone cause extinguishment; the suspension of the exercise of a right is not sufficient to prove an intention to abandon it. There must be other circumstances in

A the case to raise a presumption of the intention to abandon, and abandonment will not lightly be inferred.

We find that there are no other circumstances for us to raise such presumption of intention to abandon. Again, there are merits in learned counsel for the plaintiffs' argument on this issue.

B

CONCLUSION

C **[20]** In conclusion, we agree with learned counsel for the plaintiffs that the estoppel found by the learned trial judge against the plaintiffs is in effect a partial determination or extinguishment of the registered statutory interest of the plaintiffs. Such finding is not supported by any legal basis (see further: *Halsbury's Law of Malaysia* at para 150.474: Extinguishment of easement under D the Sarawak Land Code). More importantly, the plaintiffs are entitled to an access road of 16ft in law. We agree with learned counsel that in law something wrongful has been done to them that took away their lawful entitlement to an access road of 16ft granted by statute and registered in their document of title and in the document of title of the defendant as well. We also cannot agree E more that the moment the chain-link fence is removed, the defendant has to ensure that do not commit any wrong or further wrong to the legal entitlement of the plaintiffs. In the same token, the defendant's contention that since the driveway was only as wide as the chain-link fence allowed for the past 48 years, the plaintiffs should be estopped from insisting a 16ft access road now is F fallacious. As we had mentioned above, this proposition clearly goes again the very source of the grant which must be adhered to strictly unless determined or extinguished according to law, which we find the defendant has failed to do in this case. The fact remains that the width of the access is very much reduced and this is starkly against the statutory grant as endorsed and registered. In the G circumstances, it is not possible to estop an aggrieved party from insisting a statutory 16ft access road even though they have knowledge of the reduced width before, when the reduction itself is in law unlawful and a contravention of the condition precedent to the title.

H

[21] In the result, we would allow the plaintiffs' appeal, set aside the learned trial judge's decision (including on the counterclaim) and grant the remedies as sought under paras 7(i) and 7(ii) of the statement of claim with cost of RM15,000 (subject to the payment of allocator fee) to the plaintiffs. So I ordered.

Appeal allowed with costs of RM15,000.

Reported by Mohd Kamarul Anwar